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GST on ocean freight – Smooth sailing ahead for assessees?

By **S Rahul Jain and Meeth Desai**

Taxation of a cross-border transaction is one of the most complex and disputed areas of litigation. Further, the recent trade wars between the major economies of the world are adding fuel to the fire. One specific industry which had been largely immune from GST or VAT is the shipping industry undertaking international transportation. Most major economies[1] have chosen not to levy GST or VAT on transactions involving movement of goods internationally. In India also, this position largely existed till 2017. While the value of transportation was required to be included in the landed cost of the goods for payment of customs duty, the transaction as such was not subject to service tax till early 2017. Thereafter, the Government thought it would be fit to levy service tax on transportation charges by way of specific amendments to the Finance Act, 1994 and the rules thereunder and this levy continued well into GST regime as well. Recently, the Gujarat High Court in the case of *Mohit Minerals Pvt Ltd v. UOI*, struck down the levy of GST on this transaction and the decision forms the bedrock of this article.

How the issue arose?

Just to have a quick recap, from 22 January 2017, the foreign liner or his agent was required to discharge service tax on the freight paid towards transportation of goods from outside India for all kinds of contracts, be it CIF or FOB. After the hullabaloo relating to who would pay the tax, especially for CIF contracts, the Government was quick to amend the statute with effect from 23 April 2017, and the law deemed that 'the importer' as the person liable to discharge service tax on the freight element for all kinds of contracts. This position was challenged by few petitioners and the Gujarat High Court struck down the levy of tax for these periods also[2]. We are not covering this aspect in further detail in this article.

Under GST law also, the Government continued its position of levying tax on the services of transportation of goods from outside India. Under the garb of the Rate Notifications[3] issued under the GST Acts, the Government required the importer of goods to discharge GST separately on the value of the freight component, even in case of CIF transactions. Further, in the name of facilitating computation, an option to pay tax at the rate of 5% of the CIF value of goods was provided to the assessees. Like in Service Tax, many assessees challenged the levy of tax through the rate notification before the various High Courts of the country. The Gujarat High Court has now pronounced its landmark decision in the case of *Mohit Minerals Pvt Ltd v. UOI* [2020-VIL-36-GUJ] in one such batch of appeals.

In this batch of cases, the importers had challenged the levy of IGST on the payment of ocean freight for transportation of goods by the foreign seller and sought quashing of the impugned notifications on ground of lack of the legislative competency. The High Court held

[1] Refer to Australian GST Handbook (2017-18) by Ian Murray-Jones at page 418 and 419. VAT Notice 744B for UK VAT

[2] Refer to *Sal Steel Ltd.* [TS-1244-HC-2019(GUJ)-ST]

[3] See Notification No. 8/2017-Integrated Tax (Rate)

that since the importer is neither supplier nor the recipient of ocean transportation services provided by shipping line outside India, they are not liable to pay IGST on such transactions. Just to summarize, the writ petitions of the assessee were allowed on the following independent propositions:

- Under Section 9(3) of the CGST Act, only a recipient of a service can be vested with the liability to discharge service tax**.** The term 'recipient' has to be interpreted literally. In case of CIF Contracts, importer of goods into India cannot be said to be recipient of ocean freight services. The shipping services has been availed by the exporter (seller outside India) and so importer does not have any role in the play.
- The transaction of ocean freight service by foreign shipping line is neither an inter-State nor intra-State supply as per IGST Act.
- Ocean freight has already suffered IGST as a part of value of goods imported. Dual levy of IGST cannot be imposed treating it as supply of service. Double taxation, through delegated legislation, where statute does not provide, is not permissible.

Have we heard the last word?

Considering the stakes involved, it is certain that the Department would knock the doors of the Supreme Court. Hence, it becomes important to further analyse the impact of the decision and what assessees may have to do. In light of this, some of the practical questions which assessees face are discussed in the paragraphs below.

a) **Should an assessee cease to pay tax on ocean freight** - In the authors' view, the decision of the High Court is binding on all assessees in India and the Department also[4]. Hence, so long as the matter is not stayed by the Supreme Court, the decision of the High Court would be binding. Having said that, the matter would attain finality only after the Supreme Court decides the matter. Accordingly, if the intention is to avoid litigation and credit of tax paid can be taken and utilized, the tax may continue to be paid. On the other hand, if one is willing to take risks or is unable to utilize the credit, may opt to pay GST under protest.

b) **If Tax is paid now, can the Department deny credit –** The next question which arises is if an assessee has opted to pay tax, would the Department propose to disallow credit? The answer could unfortunately be 'yes'. In the past, there have been various instances where taxes paid by the assessee were proposed to be treated as a 'deposit' and SCNs were issued seeking reversal of ITC. But in a catena of decisions, courts have held that once tax stands paid, ITC cannot be disallowed.

c) **Can SCN be issued for availment of credit of the past –** As stated in answer to query (b), the Department may issue SCN stating that the tax paid is to be treated as deposit and hence, ITC must not be availed. In such a case, the assessees may argue the matter based on the decided cases.

d) **Can an assessee claim refund of GST paid –** For the tax paid during the last two years, an assessee may make a claim for refund under Section 54 of the CGST Act as any collection during this period would be a

4 See *CIT* v. *SMT Godavaridevi Saraf* - 1978 (2) E.L.T. (J 624) (Bom.)

collection of tax without any authority of law. For the period prior to two years, the law laid down by the Supreme Court in the case of *Mafatlal Industries Limited* (111) STC 467(SC) has to be applied. One of the principal questions raised in this case related to which assessees can claim refund of taxes paid. The Court, in the opinion of the majority, held that the first question which would require consideration is whether the taxes paid erroneously would be due to an unconstitutional levy or an illegal levy.

An unconstitutional levy would be a case where a provision of the Act under which tax is levied is struck down as unconstitutional for transgressing the constitutional limitations. On the other hand, an illegal levy would be a case where the tax is collected by the authorities under the Act by mis-construction or wrong interpretation of the provisions of the Act, Rules and Notifications or by an erroneous determination of the relevant facts. Where the Court holds that levy of tax is unconstitutional, any person who has paid tax can claim a refund under Article 265 of the Constitution. On the other hand, in case where the tax has been paid by an assessee under an illegal levy, only such assessee who have contested the matter would be able to claim a refund of taxes paid. In other words, an assessee who has deposited tax but have not contested the matter would be precluded from staking a claim of refund of tax paid, relying upon the decision of the Higher Courts in someone else's case. In the present case, the Gujarat High Court has held that the notification levying tax on freight charges is ultra vires the levy contemplated under the CGST Act. In the authors' view, this interpretation would be a case an illegal levy as tax is collected on misconstruction of the provision. In such a case, only such assessee who have paid the duty under protest and are contesting the matter at any forum would be eligible to claim a refund of the taxes paid by them[5].

It is to be noted that notwithstanding the above pre-condition, in all cases, the assessee would also be required to satisfy that the test of unjust enrichment *i.e.* the incidence of this tax has not been passed on to any customer. The Supreme Court has in *Solar Pesticide v. UOI* [2000 (116) ELT 401 (S.C.)] held that if tax or duty has been paid on raw material and such taxes have been added to price of finished goods, incidence of duty shall be considered to have been passed. To summarize, any person who is intending to claim a refund of the taxes paid has to determine his eligibility in light of the above principles.

Way Forward

There is an interesting quote by Mr. Matshona Dhliwayo[6] which reads "If a ship is strong, the ocean's tide do not bother it"; likewise, though the decision passed by Gujarat High Court is likely to be challenged by the tax department before the Supreme Court, considering that the High Court has struck down the levy on multiple and well-reasoned grounds, it is unlikely that the decision of the High Court is overturned. Nonetheless, each taxpayer would have to re-evaluate its strategy based on numerous factors and decide on his way forward after taking into account commercial factors.

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[5] It is noted that the constitutionality of the levy under the Section has not been decided in the case of Mohit Minerals and that question is still open.
[6] Matshona Dhliwayo is a Canada-based philosopher, entrepreneur and author of books.

Goods and Services Tax (GST)

Finance Bill, 2020

Budget 2020 – Important changes proposed by the Finance Bill 2020 in GST regime: Budget 2020 was presented by the Finance Minister in the lower House of the Indian Parliament on 1st of February 2020. The Finance Bill, 2020 in this regard proposes many changes in the Central Goods and Services Tax Act, 2017, Integrated Goods and Services Tax Act, 2017, Union Territory Goods and Services Tax Act, 2017 and the Goods and Services Tax (Compensation to States) Act, 2017. Some of the important changes are elaborated below.

ITC – Delinking of date of debit note from date of issuance of underlying invoice: Section 16(4) of the Central GST Act, 2017 has been proposed to be amended to delink the date of debit note from the date of issuance of underlying invoice. The provision will extend the time-period to avail ITC on debit notes i.e. up to the due date of September month return or annual return following the financial year corresponding to the debit note.

Transitional credit – Time limit prescribed: Section 140 of the CGST Act has been proposed to be amended to prescribe the manner and time limit for taking transitional credit. It may be noted that this amendment is proposed to come with into force with retrospective effect from 1-7-2017, i.e. from the date of effect of the GST regime. Various sub-sections of Section 140 have been proposed to be amended for this purpose. The present amendment put to rest the controversy that there is no time limit prescribed under Section 140.

Penalty on person who retains benefit of specified transaction: Penalty equivalent to tax evaded or ITC wrongly availed or passed on to the person who retains the benefit and, on whose instance, certain specified transaction is conducted, has been proposed. According to the new sub-section (1A) proposed to be inserted in Section 122 of the CGST Act, 2017, transactions specified for this purpose cover supplies without issue of invoice or issue of incorrect or false invoice, issue of any invoice or bill without supply of goods or services, taking or utilising ITC without actual receipt of goods or services, or takes or distributes ITC in contravention of Section 20 or the rules made thereunder.

Prosecution – Person causing to commit and retaining the benefits arising out of specified transactions also to be liable: Section 132 of the CGST Act, 2017 is being amended to enhance its scope to also cover persons who cause to commit and retain the benefit arising out of the offences enumerated in said section. Section 132 at present provides for prosecution of only those persons committing any of the specified offences. Further, the amendment also proposes to make the offence of fraudulently availing input tax credit without any invoice or bill, a cognizable and non-bailable offence, if the amount of tax or ITC involved exceeds 5 crores.

Rate of GST on certain goods – Retrospective amendments: Exemption has been proposed to Fishmeal for the period 1-7-2017 to 30-9-2019 owing to confusion on applicable rate under S. No. 102 of Notification No. 2/2017-Central Tax (Rate) vs. S. No. 103 of Notification No. 1/2017-Central Tax (Rate). Further, 12% GST has been

proposed on pulley, wheels and other parts (falling under heading 8483) and used as parts of agricultural machinery, during the period 1-7-2017 to 31-12-2018. It may be noted that according to clause 130 of the Finance Bill, 2020, there would be no refund for tax already collected and deposited.

Ratio decidendi

No provisional attachment based on summons issued for proceedings against another person: Bombay High Court has held that bank account of only that taxable person can be attached under Section 83 of the Central GST Act, 2017 against whom proceedings under Section 62, 62, 64, 67, 73 or 74 are initiated. Quashing the provisional attachment of bank accounts of petitioner, the Court rejected the department's contention that even if sections as mentioned in Section 83 are not referable to the case of petitioner-assessee, proceedings get extended to him by issuance of summons to him under Section 70 in respect of proceedings against another person. The Court was of the view that Section 83 does not provide for an automatic extension to any other taxable person from an inquiry specifically launched against a taxable person. Rule 159(2) and form GST DRC-22 were also relied for the purpose. [*Kaish Impex (P) Ltd.* v. *UoI* – 2020 VIL 33 BOM]

Refund claim spread across different financial years – CBIC Circular restricting such refund is arbitrary: Delhi High Court has held that CBIC Circular No. 37/11/2018-GST, dated 15-3-2018, which puts restriction pertaining to spread of refund claim across different financial years, is arbitrary. The Court also stayed the Circular No. 125/44/19-GST and directed the department to either allow petitioner to file refund electronically on online portal or accept the same manually. Relying on judgements in *Ratan Melting & Wire Industries* and *Pioneer India Electronics (P) Ltd.,* it observed that the impugned Circulars take away the vested right of the taxpayer accrued in the relevant period. It observed that the business world cannot be told when to manufacture and when to export and there is no justification to deny refund of the ITC which have accumulated in the previous financial years. It noted that the entire concept of refund of ITC relating to zero rated supply would be obliterated if department is permitted to put any limitation that takes away petitioner's right to claim refund of taxes paid on domestic purchases used for the purpose of zero-rated supplies. The case involved ITC earned over two financial years whereas the export against the said purchases was made only in the financial year 2018-19. [*Pitambra Books (P) Ltd.* v. *UoI* – 2020 VIL 45 DEL]

Interest under CGST Section 50 is applicable only where output tax is paid in cash – Proviso to Section 50(1) is clarificatory: Madras High Court has held that interest under Section 50 of the Central GST Act, 2017 is applicable only in case where the output tax is paid in cash and not by way of ITC since there is no deprival to the department in case of payment of output tax by way of ITC. The Court was of the view that proviso to Section 50(1), as per which interest is leviable only on that part of tax which is paid in cash, has been inserted w.e.f 1-8-2019, but clearly seeks to correct an anomaly in the provision as it existed prior to such insertion, and hence, the proviso must be read to be clarificatory and be operative retrospectively. The Telangana High Court decision in the case of *Megha Engineering and Infrastructures Ltd.* was distinguished by the Court observing that at the point when that decision was rendered, the proviso was not incorporated in the statute. [*Refex Industries Ltd.* v. *Assistant Commissioner*, Writ Petition Nos. 23360 and 23361 of 2019, decided on 6-1-2020, Madras High Court]

ITC available on demo motor vehicles: The applicant purchased motor vehicles as demo cars for providing trial run to the customers and used to sell them after a certain period. The said motor vehicles were recorded as capital goods and no depreciation on the tax component of the same was claimed under the Income Tax Act. The issue under consideration was whether input tax credit (ITC) in respect of such motor vehicles was available. The Maharashtra Authority for Advance Ruling referred to Section 16(1) and Section 17(5)(a) of the CGST Act, 2017 and observed that since the demo vehicles were capital goods for the applicant and were used or intended to be used in the course or furtherance of business, that is sale of motor vehicles, ITC in respect will be available under Section 16(1). It was also held that since the applicant will be making further supplies of the demo vehicles, and there was no time limit prescribed under Section 17(5)(a) of the CGST Act for making such further supplies, ITC in respect of such demo vehicles will be available. [In RE: *Chowgule Industries Private Limited* – 2020 VIL 06 AAR]

Accommodation service to SEZ unit is inter-State supply and is zero-rated: Karnataka Authority for Advance Rulings has held that that provision of accommodation services to SEZ Unit would be treated as inter-State supply. Reliance in this regard was placed by the Authority on Section 16(1) of the IGST Act, 2017 and Circular No. 48/22/2018-GST dated 14-6-2018. The Authority also referred to Paragraph 2.3 of the said Circular, which clarified that subject to the provisions of Section 17(5) of the CGST Act, if hotel, accommodation services are received by a SEZ developer or a SEZ unit for authorised operations, the benefit of zero-rated supply shall be available in such cases to the supplier. [In RE: *Carnation Hotels Pvt. Ltd*. – 2019 VIL 484 AAR]

No GST on premium collected from employees towards parental insurance premium: Recovery of premium from the employees by the applicant towards parental insurance premium will not be treated as supply of service in the course or furtherance of business and hence not be liable to GST. The Uttar Pradesh Advance Ruling Authority in this regard observed that the applicant had transferred the whole amount, collected from their employee towards the insurance, to the insurance company, which in turn provided insurance cover to the parents of the employee. It was also noted that the applicant was in the business of development and export of software and not in the business of providing insurance services. Provisions of Sections 7(1), 2(17) and 2(102) of the CGST Act, 2017 which define the scope of 'Supply', 'Business' and 'Services', respectively were relied upon. [In RE: *Ion Trading India Private Limited* – 2020 VIL 27 AAR]

Transaction between foreign company and its project office in India when intra-company affair: Observing that Project Office was merely an extension of the foreign company in India to undertake the project in India and limited to undertake compliances required under various tax and regulatory requirements in India, Uttar Pradesh AAR has held that the transactions between the foreign company and project office were intra-company affair. Reliance in this regard was placed on various provisions of the FEMA Regulations. Further, Observing that the project office and the HO were single entity, and that the employee-employer relation was existing between the project office and expat employees, it was held that no GST was leviable on the salary paid to the expat employees and reflected in the books of account of the project office, as per Section 7(2) read with Schedule III to the CGST Act, 2017. The foreign company had constituted project offices in India for undertaking

onshore portion of the project and had sent expat employees at the project offices in India. The salary of the said expat employees was paid by the foreign company, however, in order to comply with the Indian laws, the project offices recorded salary costs of expat employees in their books of account and paid TDS on the same under the head "Salaries". [In RE: *Hitachi Power Europe GMBH* – 2020 VIL 44 AAR]

Laying down enhanced infrastructure for transmission of electricity is not integral or ancillary to supply of service of transmission or distribution of electricity: Referring to Section 2(30) of the CGST Act, 2017 defining 'Composite supply' under GST, the Uttar Pradesh AAR has held that the deposit work (laying down the enhanced infrastructure for transmission of electrical energy) undertaken by the applicant was not directly related with the transmission of electricity. Accordingly, it was held that the deposit work undertaken by applicant will not be considered as integral or ancillary to the supply of services of transmission or distribution of electricity. The applicant was entrusted with the business of transmission of electrical energy to various licensees within the State of Uttar Pradesh. The applicant was requested by distribution company to lay down the enhanced infrastructure and recover the cost from the consumer directly. Further, referring to Circular No. 34/8/2018-GST, dated 1-3-2018, it was held that the applicant was not eligible to avail exemption from levy of GST under Sl. No. 25 of Notification 12/2017-CT(Rate). The Authority also referred to Section 17(5)(c) and Section 17(5)(d) and Explanation to Section 17(5) of the CGST Act, and held that the immovable property created by the applicant did not fall under the category of "plant and machinery" and therefore the same will not be eligible for ITC. [In RE: *Uttar Pradesh Power Transmission Corporation Limited* – 2020 VIL 41 AAR]

No ITC on replacement of lifts by co-operative housing society: Relying on the Supreme Court decision in the case of *Otis Elevator Company (India)* the Maharashtra Advance Rulings Authority has held that the lift, after erection and installation is to be considered as an integral part of the immovable property, i.e. a building. Accordingly, it was held that ITC in respect of installation of lift will not be available to the applicant, a co-operative society providing various services to its members and charging applicable GST on the same. The applicant had sought an advance ruling as to whether it will be entitled to claim ITC of GST paid on replacement of existing lift. The Authority referred to Section 17(5)(d) of the CGST Act and Explanation to Section 17(5) and observed that ITC in respect of construction of immovable property, other than plant & machinery, will not be available. It noted that the definition of plant & machinery as provided under Explanation to Section 17(5) includes apparatus, equipment, and machinery fixed to earth by foundation or structural support but excludes land, building or any other civil structure. [In RE: *Las Palmas Co-operative Housing Society Limited* – 2020 VIL 37 AAR]

Access cards classifiable as pamphlets, booklets, brochures, leaflets and similar printed matter: Karnataka Appellate AAR has held that 'Access cards', printed and supplied by the applicant based on the contents provided by their customers are classifiable under TI 4901 10 20 as 'pamphlets, booklets, brochures, leaflets and similar printed matter' and GST is applicable at the rate of 5%. The AAR had earlier held that supply of access cards was classifiable as a supply of service under SAC 9989 and liable to GST at the rate of 18%. The AAAR referred to Para 5 of CBIC Circular No. 11/11/2017-GST, dated 20-10-2017 and observed that the activity undertaken brings into existence a specific new product known as "access card" and printing of

the same was ancillary to the main activity of making access cards. The printing activity was a service rendered by the appellant to himself in order to execute the supply of access cards. Further, the Authority observed that the principal supply, in the present case, was not the printing service but the supply of access cards, which was a product emerging out of the printing activity. [In RE: *Pattabi Enterprises* – 2020 VIL 13 AAAR]

UK VAT – Supply of lift service is not ancillary to principal supply of use of ski slope: The Upper Tribunal (Tax and Chancery Chamber) has held that sale of lift pass at indoor ski and snowboard center is supply of transport chargeable at reduced rate and not supply of right to use ski slope chargeable at standard rate. The Revenue department had in this case submitted that the principal service supplied by the assessee-appellant was a right to access and make use of the ski slope within their premises, which were admittedly a place of entertainment, recreation or amusement, and that the provision of use of the ski lifts was ancillary to that principal service. Allowing the appeal, the Court however held that there was absence of reciprocity between access to the slope (which was otherwise free) and the payment made by a customer in exchange for a lift pass. It observed that there is nothing fanciful about use of the slope without use of the lifts and that access to the ski slope was not dependent on the purchase of a lift pass. [*Snow Factor Ltd.* v. *Commissioner, HMRC* – Decision dated 21-1-2020 in Appeal number: UT/2018/0049, United Kingdom's Upper Tribunal (Tax and Chancery Chamber)]

Customs

Finance Bill 2020, Notifications and Circulars

Budget 2020 – Trade agreements – Procedure for administration of Rules of Origin proposed:A new Chapter VAA has been proposed in the Customs Act, 1962 to provide for enabling provision for administering the preferential tariff treatment regime under various trade agreements, including FTAs, etc. The new proposed Section 28DA, which will come into effect once the Finance Bill is passed by both the Houses of the Parliament and is assented by the President, provides for procedure to be followed by the importer while claiming any preferential rate of duty in terms of any trade agreement which India has signed with any other country. It may be noted that according to the proposals, the request for verification may be sent within five years from the date of claim of preferential tariff treatment, unless specified otherwise in the trade agreement, and the preferential tariff treatment to the goods can also be temporarily suspended pending the verification. This provision also lists the circumstances under which the claim for preferential tariff treatment may be rejected by the Customs authorities even without verification. Further, according to an amendment proposed in Section 111 of the Customs Act, relating to confiscation of goods, the goods imported under claim of preferential tariff treatment and found to contravene the provisions of the new Chapter VAA or the Rules, will also be liable to

confiscation. "Trade Agreement" has been defined as an agreement for trade in goods between the Government of India and the Government of a foreign country or territory or economic union.

Budget 2020 - Health Cess imposed on certain medical devices: A new levy by the name "Health Cess" @ 5% has been imposed on certain medical devices. This cess will be imposed on certain goods falling under Headings 9018 to 9022 of the Customs Tariff Act, 1975, on *ad valorem* basis, i.e. on the value of the imported goods. According to the provisions contained in Clause 139 of the Finance Bill, 2020 read with the declaration made under the Provisional Collection of Taxes Act, 1931, this levy is effective from 2-2-2020 and shall be in addition to any other duties of customs chargeable on such goods under the Customs Act or any other law for the time being in force. Further, as per notifications issued by the Ministry of Finance, exemption has been provided to all goods falling under Heading 9022, other than those for medical, surgical, dental or veterinary uses. It may be noted that certain goods which are exempted from the Basic Customs Duty would also be exempted from Health Cess. The exemption includes goods exempted under various specified FTAs. It may be noted that according to the letter of Tax Research Unit (TRU) and the Memorandum explaining the Budget provisions, export promotion scrips cannot be used for payment of said cess.

Budget 2020 - Import prohibition to prevent injury to the economy of the country: Central Government is at present empowered to prohibit import or export of gold or silver in order to prevent injury to the economy of the country by the uncontrolled import or export of such goods. Now this provision [Section 11(2)(f) of the Customs Act, 1962] has been proposed to be amended to include "any other goods" as well. Accordingly, the Central Government will now be empowered, after the Bill receives Presidential assent, to prohibit import or export of "any other goods" also, in order to prevent injury to the economy of the country.

Budget 2020 - Rates of Customs Duty revised for many articles: Rates of Basic Customs Duty have been increased on many products relating to Agriculture and Food Industry covered under Chapters 04, 10, 12, 17, 18, 19 and 23, Electronics Industry products covered under Chapters 84, 85 and 94, and Copper and articles thereof used in manufacturing of specified electronic items. Further, rate of BCD has also been increased on many products under category of general machinery or appliances falling under Chapter 84 of the Customs Tariff Act, and certain products of the Information Technology Industry covered under Chapter 85. Rate of BCD has also been increased on footwear including parts of footwear covered under Chapter 64, certain household items falling under Chapters 69, 70, 83, and on certain furniture items and toys falling respectively under Chapter 94 and 95 of the Customs Tariff. It may be noted that rate of Customs duty has however been decreased on certain fuels, chemicals and plastics and on certain goods of the paper industry (including on newsprint).

Further, in respect of Social Welfare Surcharge (SWS), it may be noted that all products of Chapter 84, 85 and 90 will now attract SWS. Exemptions earlier available to certain goods of these Chapters have been withdrawn. However, all commercial vehicles (including electric vehicles), falling under Heading 8702 and 8704, if imported as completely built units (CBUs) would be exempted from such surcharge with effect from 1-4-2020.

Classification of goods - Review of products classified under 'others' category: By a previous Trade Notice No. 37/209 dated 22.10.2019, the DGFT had issued an advisory to importers classifying their goods under 'others' category. In furtherance of the same, the DGFT has now restated that importers must file the Bill of Entry with specific HS codes and avoid the 'others' category as far as possible. DGFT Trade Notice No. 46/2019-20, dated 17-1-2020 in this regard notes that in case of continued mis-classification by importers, the imports classified under 'others' category may be subjected to licensing requirements. The Trade Notice also suggests that if the present HS codes are not sufficient to cover the imported products, appropriate 8-digit HS codes can be suggested for such goods.

Export of garments and made-ups – RoSCTL scheme updated: Central Board of Indirect Taxes and Customs (CBIC) has clarified that the benefit of Rebate of State and Central Taxes and Levies (RoSCTL) would be available for export of garments and made-ups with Let Export Order dates from 7-3-2019 to 31-3-2020. The Circular No. 13/2020-Cus., dated 19-2-2020 also states that for Additional Ad-hoc Incentive Scheme, providing benefit of upto 1% of FOB value of exports, the benefit shall be available for exports with LEO dates from 7-3-2019 to 31-12-2019. It may be noted that MEIS benefit has been withdrawn in respect of export of garments, with effect from 7-3-2019. The scrips received under RoSCTL and Additional Ad-hoc Incentive Scheme can be used for payment of specified duties of Customs and Central Excise.

Valuation of second-hand machinery – Procedure specified for inspection or appraisement: CBIC has laid down a procedure for inspection or appraisement of second-hand machinery. According to Circular No. 7/2020-Cus., dated 5-2-2020, the inspection or appraisement reports issued by Chartered Engineers or their equivalent, based in the country of sale of the second-hand machinery shall be accepted by all Custom Houses. The inspection or appraisement report must be in the format as specified in the Circular. The Circular also states that in case the report is not available from the country of sale, the importer would be free to engage services of any of the empaneled Chartered Engineers and that no Custom House will require any importer to have a report from a particular Chartered Engineer.

All Industry Rates of Duty Drawback revised: The All Industry Rates (AIRs) of duty drawback have been revised with effect from 4-2-2020. As per CBIC Circular No. 6/2020-Cus., dated 30-1-2020, Drawback has been increased for certain items pertaining to marine products and seafood (Chapter 3, 15, 16, 23), chemicals (Chapter 29), finished and lining leather, leather articles and footwear (Chapter 41, 42 and 64), cotton and MMF textiles (Chapter 50 to 60), carpets (Chapter 57), made-ups (Chapter 63) and glass and glass ware (Chapter 70). Further, the rates have been rationalized for bicycles tubes (Chapter 40), wool yarn/fabrics/readymade garments (Chapter 51 and 61-62) and silk yarn/fabrics/readymade garments (Chapter 50 and 61-62) among other items**.** While 31 new tariff items have been introduced in the Schedule pertaining to sectors viz. chemicals, textiles and readymade garments, leather articles and footwear and glass handicraft/ art ware, appropriate caps of duty drawback amount have been provided wherever felt necessary to prescribe upper limit of duty drawback.

Mobile phones – *Ad-hoc* incentive in addition to MEIS reward: The Central Government *vide* Notification No. 43/2015-2020, dated 29-1-2020 has amended Chapter 3 of the Foreign Trade Policy, 2015-20 to allow 2% additional ad hoc incentive for mobile phones, other than push

button type (HS Code 8517 12 11) and Mobile phones, push button type (HS Code 8517 12 19) apart from the MEIS reward. Further, this additional *ad hoc* benefit shall be allowed by virtue of filing of the application for the MEIS reward itself. The additional reward shall be applicable for the cases where Let Export Order date is between 1-1-2020 and 31-3-2020.

Ratio decidendi

EPCG Scheme – Exemption from additional customs duty (IGST) during 1-7-2017 till 12-10-2017: Gujarat High Court has held that Notification No.26/2017-Cus., dated 29-6-2017 amending Notification No.16/2015-Cus. to limit the exemption from payment of additional duty under Section 3 of the Customs Tariff Act to sub-sections (1), (3) and (5) thereof only, is repugnant to the policy declared by the Central Government under Chapter 5 of the Foreign Trade Policy 2015-2020 relating to EPCG scheme. The Court in this regard noted that when the authorisation under the EPCG Scheme was issued, the petitioner had reason to believe that it would not be required to discharge any liability in respect of additional customs duty (IGST) inasmuch as a promise was held out to the petitioner that it will not be liable. It also noted that import of capital goods under the EPCG Scheme was totally exempt from payment of additional duty, except for the short period between 1-7-2017 and 13-10-2017 and hence intention of the Government was clear that total exemption from payment of additional duty was to be granted under the EPCG Scheme. The Court concluded that hence Notification No.79/2017-Cus., dated 13th October, 2017, again providing the exemption, has to be read as clarificatory or curative in nature. The High Court also held that though Notification No.16/2015-Cus. is a statutory notification, it is not an exemption notification simpliciter. It held that the notification was an exemption notification issued to give effect to the EPCG Scheme floated under the Foreign Trade Policy which is an incentive scheme promising that the importer would be charged zero customs duty, subject to conditions. Refund of IGST paid was also ordered by the High Court. [*Prince Spintex Pvt. Ltd.* v. *Union of India* - R/Special Civil Application No. 20756 of 2018, decided on 3-2-2020, Gujarat High Court]

Computation of Customs duty on goods auctioned after expiry of warehousing period: The Larger Bench of the Supreme Court has held that the customs duty must be paid on the basis of sale proceeds realised from the sale of the goods kept in a warehouse and not on the basis of the customs duty payable at the time of filing the Bill of Entry or on the date of expiry of permitted period of warehouse. The case involved sale of imported goods by auction by the warehouse keeper after the importer refused to clear them even on expiry of warehousing period. The Court was of the view that the judgment in the case of *Kesoram Rayon v. Collector of Customs* will not be applicable in respect of the goods to be auctioned on account of failure to seek the release of imported goods by the importer though after permission from the proper officer. [*Union of India* v. *Associated Container Terminal Ltd.* - Civil Appeal No. 4490 OF 2008, decided on 14-2-2020, Supreme Court Larger Bench]

Valuation – Imported goods not bound to be sold at MRP adopted by another: CESTAT Delhi has held that an importer is free to determine his retail sale price or MRP. It observed that in the case before it, the goods were not manufactured in India and there was no prescribed MRP by manufacturer under the Legal

Metrology Act or its Rules. The Tribunal also observed that as an importer, the appellant is not bound to sell goods at MRP of another importer. It further noted that the services provided by another company comprised of free installation, copper tubing and after installation services which were not provided by appellant, and hence the goods were not comparable. Charge of undervaluation was also rejected observing that it was not department's case that assessee had remitted any amount directly/indirectly to the seller and shipper of the goods other than through normal banking channel. [*M C Overseas* v. *Commissioner* – 2020 TIOL 201 CESTAT DEL]

VKGUY benefit not available to merchant exporters procuring goods from EOU: Observing that the Vishesh Krishi and Gram Udyog Yojana (VKGUY), during 2006-07, did not grant incentives to 100% Export Oriented Units or units situated in Special Economic Zone, the Supreme Court has held that the purpose and object of the scheme cannot be defeated by granting incentives to units which exports through 100% EOUs. DGFT Circular dated 21-1-2009 was also held as not illegal. The Court noted that the circular did not modify or amend the scheme notified for the year 2006-07 and only clarified that 100% EOUs which were not entitled to seek exemption could not avail benefit indirectly through the entity purchasing from them (EOU). It also took note of the fact that in terms of Clause 3.8.5 of the scheme, the Government had reserved rights to specify from time to time the export products which shall not be eligible for calculation of entitlement and hence the circular cannot be said to be illegal in any manner. [*Nola Ram Dulichand Dal Mills* v. *Union of India* – 2020 VIL 08 SC CU]

Conversion of drawback shipping bill to DFIA – Time limit prescribed by Circular is not binding: CESTAT Ahmedabad has held that application for conversion of drawback shipping bills to DFIA shipping bills cannot be rejected on the ground of limitation as prescribed in a circular. It observed that the time limit prescribed by CBIC Circular No. 36/2010-Cus. was not binding as same was not statutory provision in terms of Section 149 of the Customs Act, 1962 as no such limit was prescribed under said section. The Tribunal was of the view that a time limit by way of a circular hence wis only a procedural requirement. Reliance was placed on the order in the case of *Bectors Food Specialties Ltd.* [*Lykis Limited* v. *Commissioner* – 2020 VIL 62 CESTAT AHM CU]

Only excess goods liable to confiscation and not eligible for exemption: CESTAT Kolkata has held that only the goods found to be in excess of what was declared are liable to confiscation and not the entire quantity of goods. It noted that a plain reading of Section 111(e) and (l) of the Customs Act, 1962 shows that these apply to such goods only which have been concealed and have not been declared and not the entire quantity of goods. The Tribunal was also of the view that denial of the exemption notification for the entire quantity of goods when the bulk of the goods are already covered by the SAFTA certificate is not supported by any legal provision. Appeals were partly allowed also reducing the penalty and redemption fine in proportion. [*Bikash Saha* v. *Principal Commissioner* – 2020 VIL 70 CESTAT KOL CU]

Central Excise, Service Tax and VAT

Ratio decidendi

Sabka Vishwas scheme – Benefit under voluntary disclosure category after denial under arrears category: The High Court of Karnataka has allowed the petitioner to opt for benefit under voluntary disclosure category instead of arrears category of Sabka Vishwas (Legacy Dispute Resolution) Scheme. It observed that the scheme in question being for the benefit of assessees needs to be construed liberally to effectuate the purpose. The benefit under arrears category was denied as petitioner's arrears of tax were yet to be assessed and adjudication was still pending. The Court observed that petitioner's apprehensions that their claim under voluntary disclosure category is likely to be turned down because of some statutory block was taken care of by department's statement that such apprehensions were unfounded. [*Ramesh Electricals* v. *UoI* – 2020 TIOL 144 HC KAR CX]

Notice pay - Amount received from outgoing employee in lieu of notice period not liable to service tax: Madras High Court has held that the amount received from the outgoing employee in lieu of the notice period was not liable to service tax. It was held that the employer cannot be said to have rendered any service *per se,* much less a taxable service, and had merely facilitated the exit of the employee upon imposition of a cost upon him for the sudden exit. It observed that notice pay, in lieu of sudden termination, did not give rise to the rendition of service either by the employer or the employee. The department had contended that the amount is liable to service tax under Section 66E(e) of the Finance Act, 1994 as petitioner had tolerated the act of immediate quitting. [*GE T & D India Limited* v. *Deputy Commissioner* - W.P.Nos.35728 to 35734 of 2016, decided on 7-11-2019, Madras High Court]

Sales tax leviable on sale of goods kept in Customs bonded warehouses to foreign going ship: Supreme Court of India has held that sale of imported goods, kept in bonded warehouse within territory of West Bengal, to foreign going ship was liable sales tax. It held that the sale, to be regarded as exempt from payment of sales tax, should be a sale which causes the import to take place or is the immediate cause of the import of goods, which was not the case here. Relying on certain precedents, the Court observed that for the sale to be in the course of import, it must be a sale of goods and as a consequence of such sale, the goods must actually be imported within the territory of India and further, the sale must be part and parcel of the import so as to occasion import thereof. The Apex Court in this regard also noted that it was not the case of the assessee that the bonded warehouses were within the area notified as customs port and/or land customs station under Section 7 of the Customs Act. It also noted that it was not the case that the goods were exported. [*Nirmal Kumar Parsan* v. *Commissioner* – 2020 VIL 01 SC]

Beneficiale liquid and DSN capsules – Common parlance test applicable for classification: CESTAT New Delhi has held that 'Beneficiale Liquid' and 'DSN capsules' were classifiable under Heading 3304 and not under Heading 2106 of the Central Excise Tariff. Setting aside the impugned order, the Tribunal allowed the benefit of exemption under Notification No. 49/2003-C.E. The Tribunal in this regard was of the view that the products were regularly prescribed by the medical practitioner for cure of

ailment even though they were available over the counter, and that classification must be based on 'common parlance test', that is, as to how the product is understood by the user/customer or medical practitioner. It also took note of the fact that a drug licence was issued to the assessee, though under the generic name. [*Shreya Life Sciences Pvt. Ltd.* v. *Commissioner* – 2020 TIOL 326 CESTAT DEL]

Cenvat credit – No overlap between Rules 3(5) and 11(3): CESTAT Mumbai has held that clearance of the inputs lying in stock as on 1-3-2007, when the final product was exempted, after reversal of the credit following the procedure laid down under Rule 3(5) of Cenvat Credit Rules, 2004 was in harmony with Rule 11(3) of Cenvat Credit Rules, 2004 and not in conflict. It was held that both the said rules, i.e. Rule 3(5) and Rule 11(3), operated in different spheres and did not overlap. The Tribunal observed that if the argument of the department was accepted that the credit attributable to the inputs lying in stock would lapse, then the appellants would be required to clear the inputs as such either without payment of duty or reversal of credit again on the same quantity of inputs on its clearance as such which would lead to an absurd situation. [*LG Electronics India Pvt. Ltd.* v. *Commissioner* – 2020 TIOL 317 CESTAT MUM]

Refund of Cenvat credit in case of export of services when unutilised credit carried forward in TRAN-1: CESTAT Chennai has allowed refund of unutilised Cenvat credit in case of export of services, where the assessee had carried forward the unutilised credit through GST TRAN-1. The Tribunal in this regard observed that though the credit was availed prior to introduction of GST, the refund claim was filed only on 22-3-2018, and it was not possible for the assessee to file ST-3 returns then. It did not accept the contention of the department that assessee ought to have debited the amount during the existence of Finance Act, 1994. Earlier decision in the case of Fine Automotive and Industrial Radiators Pvt. Ltd. was followed. [*Zamil Steel Engineering India Pvt. Limited* v. *Commissioner* – 2020 VIL 89 CESTAT CHE ST]

Service tax liability even when no direct pecuniary benefit to service recipient: CESTAT Delhi has held that even a service without any direct pecuniary benefit to the service recipient is also a service. Observing that the appellant was allowed to use space and collect parking fee, the Tribunal held that it was a valid consideration in terms of the service tax provisions. It held that it is not necessary that the consideration should always be directly in the form of money. The Tribunal declined to accept the plea that the parking space area was given to the assessee-appellant by the mall owner without any agreement with respect to financial consideration or an agreement with respect to the contingent liabilities, and observed that even the interest of the mall owners that the appellant should provide a hassle free parking, is a service to the mall owners by the assessee-appellant. Service tax liability was upheld under service of 'management, maintenance or repairs' to the mall owners. [*MGF Event Management* v. *Commissioner* – 2020 VIL 69 CESTAT DEL ST]

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